CHEEK HONG LENG

v.

KYM INDUSTRIES (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: R3-16-1-98]
19 JANUARY 2000

LABOUR LAW: *Industrial Court - Question of law - Reference to High Court - Section 33A(1) Industrial Relations Act 1967 - High Court remitting case to Industrial Court for adjudication - Application for reference to be heard by another High Court - Whether proper - Whether order a nullity - Whether to appeal to Court of Appeal - Industrial Relations Act 1967 ss. 33A(1), 33A(5), 33B*

CIVIL PROCEDURE: *Judgments and orders - Nullity of order - Reference from Industrial Court - Order by High Court for matter to be re-adjudicated - Whether a nullity - Whether appealable - Simultaneous applications for leave to appeal and for reference to be heard by another High Court - Whether amounted to duplicity - Industrial Relations Act 1967 ss. 33A(1), 33A(5)*

The Industrial Court in this case had awarded the applicant RM30,000 as compensation for his unlawful dismissal. Dissatisfied with the award, the applicant applied to the Industrial Court under s. 33A(1) Industrial Relations Act 1967 ('the Act') to refer two questions of law to the High Court. The Industrial Court ruled that only the second of the two questions posed merited a reference, and consequently referred only that question to the High Court ('the reference').

The reference was heard by Nik Hashim J, wherefore the learned judge took the view that the reference was irregular and that the Industrial Court had not exercised its powers properly. The learned judge, in the circumstances, set aside the reference and remitted the matter to the Industrial Court for re-adjudication ('the said order'). The applicant applied to the Court of Appeal for leave to appeal against the said order. Pending that, however, the applicant applied by way of motion to the present court, seeking the court's indulgence to set aside the said order and to hear and determine the reference.

Before the learned judge herein, the applicant argued, *inter alia*, that Nik Hashim J had not confined his decision on points of law raised by the parties, and the said order, therefore, was a nullity it being not a 'decision' made under s. 33A(5) of the Act. The main issue that arose was whether the applicant's complaints here were appealable matters, which properly ought to be ventilated in the Court of Appeal.

Held:

[1] This court cannot accept the applicant's contention that the said order was a nullity because the learned judge had decided on issues not canvassed by the parties. Accepting the argument would be tantamount to saying that the court is precluded from examining the issue of its own jurisdiction, even when the same is lacking on the face of it. Such a proposition is clearly untenable. (p 129 a-c)

[2] The applicant had contended that the notes of evidence showed that the Industrial Court had in fact satisfied itself of the compliance of the factual requirements. If that be so, then what the applicant contended was that the learned judge had erred in fact. That procedurally is an appealable matter and therefore cannot amount to a nullity. Likewise, the applicant's contention that he was deprived of an opportunity to reply on the case relied on by the learned judge and was therefore denied of natural justice, was an appealable point of law which ought to be ventilated in the Court of Appeal. (p 129 d-f)

[3] The applicant, by his petition of appeal, stated that he would withdraw the notice of motion in the High Court in the event that the application before this court is successful. The clear acknowledgment here is that the applicant will proceed in the Court of Appeal if he is not successful in the present court. This is duplicity under any circumstances. The applicant should not be allowed to litigate the matter twice. (p 130 c-d)

[Notice of motion dismissed.]

Legislation referred to:
Industrial Relations Act 1967, ss. 20(3), 33A(1), (5), 33B(1)

For the applicant - LG Seah (R. Subithra); M/s Lobo & Assocs
For the respondent - Puravelan (KY Ho); M/s Kumar Jaspal Quah Aishah

Reported by WA Sharif

JUDGMENT

Faiza Tamby Chik J:
This is an application *vide* the notice of notion in encl. 14 for the following relief, *inter alia*:

(a) An order to set aside the decision made by his Lordship Dato' Nik Hashim bin Nik Ab Rahman on 28 January 1999 (hereinafter referred to as "the said decision");

(b) That this Honourable court hear and determine the reference dated 19 June 1998 made by the Industrial Court under 33A(1) of the Industrial Relations Act 1967 ("the said Act").

This application is supported by the facts and exhibits in the affidavit of Cheek Hong Leng @ Cheek Hong Leong (the applicant/appellant affirmed on 9 April 1999 (encl. 13)). The said decision may be found in the grounds of judgment marked as exh. CHL4 at p. 102-113 of the exhibits annexed to encl. 14 (in particular, at p. 112, last paragraph).

The background facts of this case are as follows: The applicant had commenced as a production manager. Due to certain reasons, he had considered himself as dismissed by the respondent with effect from 24 May 1991. He was earning a salary of RM3,450 per month at the material time. Subsequently, the applicant had made representations to the director of Industrial Relations in respect of his dismissal. The matter could not be resolved and was thereafter referred by the Honourable Minister of Human Resources under s. 20(3) of the Industrial Relations Act 1967 ("the said Act") to the Industrial Court to be heard and determined. The applicant's case was registered as case No. 2/4426/91. The Industrial Court heard the case and thereafter handed down its decision in Award No. 238 of 1994 dated 28 June 1994 ("the 1st award"). The Industrial Court had held that the applicant's dismissal by the respondent was without just cause or excuse and ordered the respondent to pay the applicant a lump sum of RM30,000 as compensation. After the 15 award was handed down, the applicant had made an application by Form "U" dated 22 July 1994 to the Industrial Court under s. 33A(1) of the said Act for two questions of law to be referred to the High Court for its determination. A copy of the said Form "U" and its annexure is marked as exh. CHL1 at pp. 16-17 of the exhibits in the cause bundle (encl. 14). In the meantime, the respondent had applied to the High Court *vide* Originating Motion No. R2-25-82-94 for an order of *certiorari* to quash the 1st award. On 7 August 1995, when the respondent's application came up for hearing, the respondent withdrew its application whereupon it was struck off with costs. The respondent did not file any appeal.

Thereafter, the Industrial Court comprising of the Industrial Court President and two panel members (one selected from a pool of panel members representing employers and the other from a pool of panel members representing employees' interests) heard the applicant's s. 33A(1) application. The Industrial Court later handed down its decision by Award No. 218 of 1997 ("the 2nd award"), a copy of which is marked exh. CHL2 at pp. 19-22 of the cause bundle in encl. 14. The Industrial Court through the 2nd award had by unanimous decision decided to refer only the second question of law to the High Court to be determined under s. 33A(1) of the said Act. The second question of law reads as follows:

Whether or not having held that the claimant is entitled to a remedy because of the principles of equity and good conscience, the Industrial Court erred in law in giving equitable relief in the form of an order for reduced compensation against the guilty company/employer.

Pursuant to the Industrial Court's 2nd award, the Industrial Court had prepared and forwarded a notice of reference dated 19 June 1998 and appeal record under s. 33A(1) of the said Act. A copy of the said appeal record which contains the 1st and 2nd awards, the pleadings and the Industrial Court's Notes of Evidence is marked as exh. CHL3 and may be found at pp. 24-100 of the exhibits in encl. 14. On 6 January 1999, the s. 33A(1) reference was heard by Nik Hashim Nik Ab Rahman J. Both parties represented by counsel and submissions were made. The learned judge then reserved his judgment. On 28 January 1999, the learned judge made an order to the effect that the Industrial Court's notice of reference dated 19 June 1998 made under s. 33A(1) of the said Act be set aside and that the matter is remitted to the Industrial Court for readjudication, with no order as to costs (hereinafter referred to as "the said order" (see p. 112 last paragraph of the grounds of judgment annexed to encl. 24). As a matter of prudence, the applicant had on 26 February 1999 filed an application to the Court of Appeal for leave to appeal against the said order. The said application (W-08-75-99) is still pending hearing in the Court of Appeal. In the meantime, the applicant had applied for a copy of the grounds of judgment in respect of the said order made on 28 January 1999. On 8 March 1999, the applicant's solicitors had received a copy of the said grounds of judgment. A copy of the same is marked as exh. CHL4 at pp. 102-113 of the exhibits in encl. 14.

The instant application *vide* notice of motion in encl. 14 before me was made after having sight of the said grounds of judgment referred to above. The subject matter of the instant application *vide* the notice of motion (encl. 14) is for the said order made on 28 January 1999 be set aside and for this court to hear and decide the question of law referred to it by the Industrial Court (see paras. 2.7 and 2.8 hereinabove). This is because it is the applicant's contention that the said order is a nullity because it is not a "decision" made under and within the meaning of s. 33A(5) of the said Act. The applicant has declared in para. 13 of his affidavit in encl. 13 that in the event that his application herein is successful, he will withdraw his application in the Court of Appeal. The applicant is asking this court to set aside an earlier order. That order was made on the 28 January 1999. It was made by another court of similar jurisdiction ie, a High Court. The applicant is contending that earlier order is a nullity. Therefore, this court can set it aside. The applicant is contending it is a nullity because the judge of the High Court in the earlier order had decided on issue not canvassed by the parties. The applicant says

that he is taken by surprise (para. b of the applicant's submissions). Taking the above ground to its logical end, the applicant is asserting that the learned judge was confined to reach his decision on points of law raised by parties. The court would logically (if the above premise is accepted) be precluded from examining the issue of its own jurisdiction even it is lacking on the face of it. I think the above proposition is untenable. It would be analogous to the situation where inadmissible evidence does not become admissible by reason of counsel's lack of objection. Suddenly, the court is not seized of jurisdiction if in law antecedent requirements are not satisfied. In any event, the applicant is seeking to rely on factual premises to support his stand. He is saying that the notes of evidence shows that the Industrial Court had in fact satisfied itself of the compliance of the factual requirements. If that is the case, then it is being contended by the applicant that the learned judge had erred in fact. Procedurally, it is an appealable matter. It cannot amount to a nullity in law. The applicant is also stating that he was deprived of an opportunity to reply on the case relied on by the learned judge. Again, if the argument is accepted, it would amount to, an appealable point of law. If the case relied on by the learned judge is not accepted by the appellate court, it can be overruled. If it is said that the applicant was denied natural justice in that his counsel did not have the opportunity to reply to the learned judge, then again the Court of Appeal would be the appropriate forum to ventilate the grievance.

The applicant is also contending that the learned judge had erred when he failed to note that the Industrial Court had examined the factual events (para c of the applicant's submission). The above contention I think is an error of fact, if made out by the applicant. It is appealable. Errors of fact cannot be considered to render a decision a nullity. Para d of the applicant's submission stated that the High Court quashed the wrong award. It must be observed that learned counsel for the applicant had spent considerable time before the learned judge arguing that the 1st award should be quashed. The arguments before the learned judge were predicated on a reference on the 2nd award. There was no ambiguity that parties were asking that the 1st award be quashed. The learned judge had ruled that even before you can consider quashing the 1st award, 2nd award was a nullity for the reasons he had given. The learned judge then proceeded to quash the 2nd award. The applicant is not seeking to say that the wrong award was quashed. This confusion seems to have arisen post judgment. High Court cannot quash an order by the Industrial Court made under s. 33A(1). The applicant is saying that s. 33B makes it statutorily protected. I think what is being contended is s. 33B(1) precludes any High Court from examining its jurisdiction. If the Industrial Court had filed in its duties to comply with the provisions of s. 33A(1), then the High Court cannot question its failure.

The next issue raised by the applicant is that the order is not a decision. This is because it is not a consequential order. It is not in dispute that the learned judge had not decided on the question of law. The learned judge had decided that the Industrial Court had not exercised its powers properly. Therefore, the reference to the High Court was irregular. The applicant is therefore, contending that because there is no decision on the question of law, it is not a decision. An analogous situation would be to argue where an appeal is not properly before the High Court and is dismissed on that preliminary basis to go on and apply to set aside the earlier dismissal order on the basis that the appeal was not decided. Upon perusing the Petition of Appeal it is noted that para. 9 of the further affidavit of the applicant affirmed on 9 April 1999 clearly states that the applicant will withdraw the notice of motion in the High Court in the event this application before this court is successful. The question posed is what happens in the event he is not successful. It is a clear acknowledgment that he will proceed in the Court of Appeal. That is duplicity under any circumstances. The applicant should not be allowed to litigate a matter twice. For these reasons the applicant's notice of motion is dismissed with costs.